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No. 79-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF MILLIKEN & COMPANY, MILLIKEN RESEARCH CORPORATION AND MOULINAGE ET RETORDERIE DE CHAVANOZ AS AMICI CURIAE

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10154
(212) 644-8000

Counsel of Record for Milliken & Company, Milliken Research Corporation and Moulinage et Retorderie de Chavanoz

Of Counsel:

JAY TOPKIS
JAY GREENFIELD
STEVEN B. ROSENFELD
RONALD W. MEISTER
HOWARD S. VEISZ
ANDREW KULL
GERARD E. HARPER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Milliken & Company, Milliken Research Corporation and Moulinage et Retorderie de Chavanoz respectfully move this Court for leave to file the accompanying brief as amici curiae. The attorneys for the Petitioners, and for Respondents Weyerhaeuser Company and Willamette Industries, Inc., have consented to the filing of this brief. The attorneys for the remaining Respondents have declined to consent.

Our interest arises from our status as defendants in *Duplan Corporation, et al.* v. *Deering Milliken, Inc., et al.*, Consol. Civ. No. 71-306, pending in the United States District Court for the District of South Carolina. In *Duplan,* which is awaiting trial on the issue of damages, the Milliken defendants have been found liable for antitrust violations committed in combination with a third party, Leesona Corporation. Plaintiffs in *Duplan,* having settled with Lee-

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sona, now seek to recover from the Milliken defendants some $27.5 million in treble damages attributable to Leesona's acts. The Milliken defendants have obtained the court's permission to amend their pleadings to assert an affirmative defense of claim reduction.

The case at bar raises the broad issue of whether there should be a right of contribution for defendants in antitrust actions. Because plaintiffs in this case have reached settlements with most of the defendants, the issue of contribution must here be considered in connection with its corollary doctrine of claim reduction, a rule designed to achieve apportionment of damages in cases that involve partial settlements. The briefs submitted by the parties on the petition for certiorari have contained relatively little discussion of claim reduction, and it has even been suggested by certain Respondents that claim reduction is not properly part of the case.

Because we believe, on the contrary, that claim reduction is of central importance to the disposition of this case, it is likely that the accompanying brief will contain a more direct treatment of the question than might otherwise be before the Court.

Dated: August 14, 1980

Respectfully submitted,

/s/ Simon H. Rifkind

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Simon H. Rifkind

Paul, Weiss, Rifkind, Wharton
& Garrison
345 Park Avenue
New York, New York 10154
(212) 644-8000

Counsel of Record for
Milliken & Company, Milliken
Research Corporation and
Moulinage et Retorderie de Chavanoz

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BRIEF OF MILLIKEN & COMPANY, MILLIKEN RESEARCH CORPORATION AND MOULINAGE ET RETORDERIE DE CHAVANOZ AS AMICI CURIAE

Milliken & Company, Milliken Research Corporation and Moulinage et Retorderie de Chavanoz submit this brief as amici curiae. We urge the court to adopt a combined rule of contribution and claim reduction for treble-damage antitrust litigation. By "contribution" we mean the right of a defendant who has paid a judgment to obtain contributions to that payment from fellow wrongdoers in proportion to their equitable responsibility for the damage suffered by plaintiffs. "Claim reduction" comes into operation when a plaintiff has settled with some but not all of those responsible for his injury. Claim reduction reduces the plaintiff's ultimate judgment against nonsettling defendants in proportion to the settling defendants' equitable share of the

damages: *i.e.*, in the amount for which settling parties would have been liable for contribution had they not settled.

Interest of the Amici

Milliken* is a defendant in an antitrust action, *Duplan Corp.* v. *Deering Milliken, Inc.*, 444 F. Supp. 648 (D.S.C. 1977), *aff'd*, 594 F.2d 979 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 666 (1980).

In *Duplan*, Milliken was found to have conspired with Leesona Corporation to fix the royalty rates charged by Milliken and Leesona for the use of certain textile machinery patents which each licensed. The case is now awaiting trial on the issue of damages. In the four years antedating the outbreak of litigation, the plaintiffs claim to have paid $9.7 million in royalties to Leesona, while paying only $5.6 million to Milliken. Plaintiffs in *Duplan* subsequently settled with Leesona for $1.5 million. They now seek to recover from Milliken the whole amount of the royalties paid to both conspirators, trebled, less only the $1.5 million received in settlement. In addition to liability for its own acts, therefore, Milliken faces a potential liability of $27.5 million for damages attributable to the acts of its competitor—a burden of damages shifted to Milliken by Leesona's settlement with the plaintiffs.

The *Duplan* court has granted Milliken's motion for permission to amend its pleadings to assert an additional affirmative defense of claim reduction. Noting "the uncertainty of the state of the law" on the subject of contribution and claim reduction in antitrust litigation, the court "found

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* Milliken & Co., Milliken Research Corporation and Moulinage et Retorderie de Chavanoz, although jointly represented, are separate entities having distinct roles in the matters at issue in *Duplan*. For present purposes, however, we will ignore these distinctions and refer to the amici together as "Milliken."

appealing the logic of the defendants' position here when considered in light of the peculiar facts of this case" and concluded that the motion to state a claim reduction defense should be allowed. *Duplan Corp.* v. *Deering Milliken, Inc.*, Consol. Civ. No. 71-306 (D.S.C. August 4, 1980).

The ultimate recognition of such a defense may well be determined by this Court's decision here. It is of the utmost interest to Milliken, therefore, that this Court give careful consideration to the role of claim reduction in analyzing the general question of damage apportionment in antitrust cases.

Statement of the Case

The case at bar is a consolidated, industry-wide class action alleging price fixing by manufacturers of corrugated containers. Plaintiffs' estimates of total damages to all class members, trebled, have been as high as $5.9 billion. (Petition for certiorari at 3.)

Plaintiffs' claims against most of the defendants will never be tried, because this case has been litigated primarily through settlements. Using two "bargain" settlements as an entering wedge, plaintiffs exerted ever-increasing settlement pressure on the remaining defendants: since every defendant that settled for less than its proportional share of the total damages effectively increased the potential liability facing any nonsettling defendant. In what could serve as a textbook example of game theory—the price of settlement, per unit of market share, increased with each settlement that was reached—plaintiffs eventually obtained more than $300 million in settlements with defendants representing more than 80 per cent of the market. (Petition for certiorari at 3-4 & Appendix D.)

As a result of these partial settlements, any nonsettling defendant against whom plaintiffs may eventually obtain a

judgment will be potentially liable for billions of dollars in damages attributable to the overcharges of its settling competitors. The inequity of this massive shifting of liability from one defendant to another—and the spectacle of a coercive settlement process virtually supplanting a trial on the merits as the vehicle for enforcing the private damage provisions of the antitrust laws—make this case a striking illustration of the need for rules of damage apportionment in antitrust cases.

Summary of Argument

This Court now faces the question of whether such rules should be adopted, and in what form. We submit that the most coherent approach to damage apportionment—evolved through case law, legislative proposals, and commentary—combines a right of contribution between the parties liable for an injury, where no partial settlements intervene, with a rule of claim reduction where there have been partial settlements. Since in the case at bar there have been extensive settlements, we ask the Court to declare claim reduction the proper remedy.

I.

CLAIM REDUCTION AFFORDS AN EQUITABLE APPORTIONMENT OF DAMAGES IN CASES INVOLVING PARTIAL SETTLEMENTS.

If this Court rejects the need for any damage apportionment in antitrust cases, it need not concern itself with claim reduction. If, on the other hand, the Court accepts damage apportionment as an equitable objective, it must consider the merits of claim reduction as the means to achieve apportionment in instances of partial settlements.

We are sure that the parties' briefs will discuss at length the conflict in the Courts of Appeals on the broad issue of damage apportionment and the desirability in general of a rule permitting contribution in antitrust cases. Our brief, therefore, will concentrate on the corollary rule of claim reduction as the means to adapt contribution principles to cases, such as this one, in which an antitrust plaintiff has reached settlements with some but not all of the defendants.

Claim reduction has been developed as an adjunct to contribution to preserve the "finality" of partial settlements, since it is recognized that allowing claims for contribution to be asserted against defendants that have "bought their peace" would operate as a destructive deterrent to settlement. Under claim reduction, settling defendants are immune from claims for contribution; and a plaintiff's claim against remaining defendants is reduced by the amount for which settling parties would have been liable for contribution, had they not settled. By acceptance of a partial settlement, in other words, the plaintiff is regarded as having sold his claim for any damages attributable to the party with whom he settles.

A. Claim Reduction Is Equitable

The argument for claim reduction rests on fairness. As the Eighth Circuit declared, approving contribution in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (1979):

> The deciding factor in our decision is fairness between the parties. . . . There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

Where the same shifting of burdens occurs through the mechanism of partial settlements, identical considerations support a corrective rule of claim reduction.

In *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), this Court recognized as an ultimate objective "the 'just and equitable' allocation of damages" among defendants, observing that

> worldwide experience has taught that that goal can be more nearly realized *by a standard that allocates liability for damages according to comparative fault whenever possible.* (421 U.S. at 411; emphasis added.)

The equitable objective identified in *Reliable Transfer* is fully as applicable to amounts paid in settlement as it is to damage judgments. That objective is disserved not only when a defendant faces a judgment for damages fairly attributable to the acts of others; it is equally disserved whenever a settling wrongdoer pays less than his equitable share of the damages because the plaintiff finds it expedient to shift that burden to someone else. It is disserved, again, if settling defendants are forced by fear of ruinous judgments to pay more than a reasonable compromise of their own potential liability, because of the coercive tactics often employed by plaintiffs in obtaining class-action settlements.*

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* A detailed description of the settlement strategy employed in this case may be found in the briefs of the parties on the petition for certiorari and may be expected to appear in their briefs on the merits. The problem of coercive settlements was addressed in congressional hearings on S. 1468 and in the subsequent report of the Senate Judiciary Committee. *See Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) at 32-48, 66-72; S. REP. No. 96-428, 96th Cong., 1st Sess. (1979) at 1-3, 14-17.

The power to shift a massive burden of damages from one defendant to another—to offer favorable terms to one defendant when it suits plaintiff's advantage, and in doing so to increase the burden facing any defendant that wishes to litigate—obviously provides antitrust plaintiffs with an incalculable strategic advantage in negotiating settlements. But it is an advantage obtained at the expense of equity and due process to the antitrust defendant, and at the expense of the integrity of the legal system under whose aegis the settlements are extracted.

The antitrust laws provide that violators shall be liable for three times the damages caused to a plaintiff, and the equitable principles embodied in *Reliable Transfer* suggest that justice will be best served if each defendant is liable for the full extent of his own wrong, no more and no less. Yet in the absence of contribution and claim reduction, an antitrust plaintiff may vary at will the statutory penalty as it applies in practice to a given defendant, mulcting one for five or ten or a hundred times the amount by which he overcharged the plaintiff (to take a price-fixing example), while letting another off scot-free. The proper role of private attorneys-general does not extend to this unprincipled and self-serving discretion.

Contribution and claim reduction do not interfere with joint and several liability, since a plaintiff remains free to sue anyone he chooses and collect his judgment from anyone he can. Nor does claim reduction detract from a plaintiff's right to collect the whole of the damages to which he is entitled. Simply stated, under claim reduction a plaintiff is considered to have sold his claim for any damages attributable to the defendant with whom he settles, and to have received full satisfaction for that portion of his claim upon terms negotiated by himself. *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1250 (5th Cir. 1979);

Martello v. *Hawley,* 300 F.2d 721, 724 (D.C. Cir. 1962). There is no harshness in such a rule, which merely imposes the arm's-length standards by which settlements in most litigation are ordinarily reached. It would simply remove from the antitrust plaintiff the anomalous power to "compromise" a claim without giving up anything—a power he enjoys if whatever is foregone in settlement with one defendant may be recouped from another less favored.

Even if a partial settlement fairly reflects the settling defendant's potential liability at the time it is made, claim reduction is still necessary to avoid a degree of double recovery in a subsequent judgment. The net present value of a claim that is settled is not the same as the anticipated judgment in the event plaintiff is successful: it is the anticipated recovery less a discount, normally substantial, for the likelihood of success, the expense of litigation, the time value of money, and related factors. These elements of the settlement must equal in value the differential between the settlement price and the anticipated recovery in the plaintiff's own estimation, since otherwise the plaintiff would not settle. If the plaintiff then proceeds to judgment against another defendant, and recovers from him the damages attributable to the settling defendant less only the cash received in settlement, the value of the non-cash differential has been recovered twice.

As this Court noted in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 348 (1971), a double recovery is not permitted:

> It is settled that, entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double repayment.

Nothing obstructs the extension of this logic to cover the non-cash value of a partial settlement except the difficulty of valuation. Under a rule of claim reduction the problem is eliminated, because the necessary valuation is performed by the settling parties themselves. To apply claim reduction in respect of such a settlement is merely to hold the plaintiff to his own bargain.

B. The Authorities Supporting Antitrust Contribution Foresee Claim Reduction as the Means to Resolve the Problem of Partial Settlements

By suggesting that claim reduction must necessarily be considered part of the question of damage apportionment in the instant case, we are not asking the Court to decide a different question from the one it granted certiorari to consider. On the contrary, the theory of contribution in antitrust cases, as advanced by its recent proponents, anticipates the problem of partial settlements and incorporates a rule of claim reduction as the preferred solution.

Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), in which it was held that antitrust defendants might have a cross-claim for contribution against co-conspirators, was a case that did not present for decision the problem of partial settlements. Nevertheless, the Eighth Circuit's ruling in favor of contribution was conditioned on the assumption that "in the proper case the court should be able to fashion a rule of contribution which will protect the rights of settling defendants," 594 F.2d at 1184. The first district court to put this admonition into practice has interpreted it to require a rule of claim reduction. In *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979), the district court held that a proposed antitrust settlement could not be approved unless (i) a settling defendant were released from subsequent liability for contribution, and

(ii) nonsettling defendants were released "from liability for the settling defendant's actions."

Both the antitrust contribution bill pending in Congress, and the legislative proposal for antitrust contribution prepared by the ABA Section of Antitrust Law, incorporate provisions for claim reduction in cases of partial settlements. The pending bill, which would establish contribution only in price-fixing cases, provides that a settling plaintiff's claim against remaining defendants shall be reduced by the greatest of (1) an amount stipulated in the settlement; (2) the consideration received by the plaintiff; or (3) "treble the actual damages attributable to the settling person's sales or purchases of goods or services." S. 1468, 96th Cong., 1st Sess., § 4I(b) (1979).* The ABA proposal, not restricted to price-fixing cases, provides that following a partial settlement a plaintiff may "elect to withdraw from the damage action all claims based upon the acts or omissions of the settling person" and that, failing such election, "the court shall reduce any judgment by the amount for which each settling defendant would have been liable for contribution had there been no settlement." American Bar Association, *Report of the Section of Antitrust Law with Legislative Recommendation* § (f) (1979); *see* 49 Antitrust L.J., No. 1 (scheduled for Fall 1980 publication). The full text of these proposed statutes is set forth in the Appendix to this brief.

Recent commentary on the subject of antitrust contribution also proceeds on the assumption that claim reduction would be a necessary part of any contribution rule. A *Harvard Law Review* Note, reviewing the judicial opinions and legislative proposals in the area of antitrust contribu-

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* An identical bill has been introduced in the House of Representatives as H.R. 6792, 96th Cong., 2d Sess. (1980).

tion, concludes both that contribution should be allowed and that courts should apply claim reduction in cases of partial settlements. Note, *Contribution in Private Antitrust Actions,* 93 Harv. L. Rev. 1540, 1560-61 (1980). A forthcoming article by Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis,** although generally critical of contribution, concludes nevertheless that claim reduction should be incorporated in any rule of contribution that might be adopted:

> If contribution is adopted, it should be limited to nonsettling defendants (*i.e.,* a defendant who has settled cannot be sued for contribution) and a litigating defendant's liability should be reduced by the amount the settling defendants would have been required to pay in contribution if no one had settled . . . .

Further reason for regarding claim reduction as an integral part of the overall question before this Court is found in the decisions and statutes in other areas of the law in which the theory of claim reduction was developed as a complement to rules of contribution. A leading decision in this area is the opinion by Mr. Justice Brennan, then a Justice of the Supreme Court of New Jersey, in *Judson* v. *People's Bank & Trust Co.,* 17 N.J. 67, 110 A.2d 24 (1954). In *Judson,* a fraud case, the court construed a contribution statute that was silent on the question of partial settlements and concluded that an implied rule of claim reduction was the "clearly preferable" solution:

> Collusive settlements are wholly ineffective when a credit of any settler's *pro rata* share is the required

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* The article is scheduled to be published in 23 J. L. & Econ. (October 1980).

> result of any settlement, and this helps attain one of the objectives of the contribution statute. And, thereby the settling tortfeasor is assured of the finality of his settlement, and impairment of the public policy favoring compromise is avoided. The injured party should not be discouraged from settlement by such a rule. He cannot complain of unfairness, since ". . . the reduction would be a direct result of his own act in accepting less than [the settler's *pro rata* share of] the total recoverable damages in settlement with the compromising wrongdoer." (17 N.J. at 93, 110 A.2d at 36-37; citation omitted.)

Comparable federal decisions include *Gomes* v. *Brodhurst,* 394 F.2d 465, 468-69 (3d Cir. 1968) (adopting rules of contribution, claim reduction, and comparative negligence for the Virgin Islands); *Martello* v. *Hawley,* 300 F.2d 721, 723-24 (D.C. Cir. 1962) (claim reduction for the District of Columbia); and *Doyle* v. *United States,* 441 F. Supp. 701, 710-13 n.5 (D.S.C. 1977) (claim reduction for maritime collision cases).

Recent statutes establishing contribution between joint tortfeasors also incorporate claim reduction provisions. An example is New York's General Obligations Law § 15-108 (1974), providing for claim reduction "in the amount of the released tortfeasor's equitable share of the damages" in terms of relative fault. Similar provisions appear in the new Uniform Comparative Fault Act, 12 U.L.A. (1980 Supp.) 32-42, approved in 1977 by the Commissioners on Uniform State Laws. The full text of N.Y. Gen. Oblig. L. § 15-108, and pertinent extracts from the Uniform Act, are set forth in the Appendix to this brief.

In sum, the clear consensus of the courts, legislative draftsmen, and commentators that have considered the issue of contribution in the context of partial settlements

favors claim reduction as the only means "to blend the themes of compromise and contribution, maintaining the essential integrity of each as far as possible." *McKenna* v. *Austin,* 134 F.2d 659 (D.C. Cir. 1943) (Rutledge, J.). The issue of antitrust contribution thus comes to this Court with claim reduction comprising an inescapable component of the proposed rule.

C. Significant Objections to Allowing Antitrust Contributions Are Answered by the Inclusion of Claim Reduction

Inclusion of claim reduction in a rule of contribution removes or greatly ameliorates most of the practical objections to contribution in antitrust cases, as advanced by the district court below. Because claim reduction is designed to meet these very objections, the merits of a contribution rule cannot properly be evaluated in isolation from its claim reduction component.

The principal objection advanced against contribution *per se* is the deterrent to settlements that would result from a rule that left settling defendants exposed to subsequent contribution claims. Claim reduction obviates this difficulty entirely: indeed, the whole point of claim reduction is to provide a means of damage apportionment while preserving for any defendant the option to "buy his peace" through settlement with the plaintiff.

The suggestion that claim reduction itself would discourage compromise, by reducing a plaintiff's incentive to make partial settlements, does not withstand scrutiny. By treating each partial settlement as a negotiated sale of that portion of a plaintiff's claim fairly attributable to the acts of a given defendant, claim reduction would assuredly discourage collusive settlements, or settlements which—though not strictly collusive—depend for their attractiveness on the recognition that the settling defendant's proper

burden of liability is being shifted to someone else. This aspect of claim reduction, however, is one of its virtues. There would remain for plaintiffs and defendants alike the possibility of settling on the basis of an arm's-length compromise of the plaintiff's anticipated recovery against a given defendant. Such are the conditions that obtain whenever any lawsuit between a single plaintiff and a single defendant is settled; and there is no reason to suppose that they should prove an obstacle to settlement in antitrust cases.

Contribution and claim reduction both require a means of allocating responsibility for plaintiff's injury between defendants, but the mechanics of allocation will not necessarily increase plaintiff's burden of litigation. The Eighth Circuit has held a *pro rata* apportionment to be equitable in a monopolization case, *Professional Beauty Supply, supra,* 594 F.2d at 1182, n.4. In other kinds of antitrust cases—a horizontal price-fixing case being the most notable example—the nature of the anticompetitive conduct permits a direct determination of the proportion in which each defendant contributed to plaintiff's injury; and in such cases, we submit, it is most appropriate that damage apportionment be made a function of the economic transactions that are the basis of liability. This is the approach adopted by S. 1468, which would apportion damages for price-fixing in accord with "the settling person's sales or purchases of goods or services"; *see also* Note, *Contribution in Private Antitrust Actions, supra,* 93 Harv. L. Rev. at 1560.*

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* As the present case amply demonstrates, such an allocation of responsibility need not add to plaintiff's litigation burden any more than would a simple *pro rata* rule. Here, plaintiffs have already entered numerous settlements on the basis of their own assessment of defendants' relative shares of the container market. Since the market shares so assessed have been the foundation of the settlements in question, they constitute the ideal basis of apportionment for claim reduction purposes.

Finally, any objection to the supposedly "retroactive" character of contribution as applied to this case is largely mooted by a claim reduction rule. The settling defendants, who hoped to buy their peace at the cost of immense settlements, would doubtless complain of the unfairness of having to respond to subsequent claims for contribution from nonsettling co-defendants: but claim reduction bars such claims. Any suggestion of unfairness to the plaintiffs—that they settled with certain defendants in the expectation of being able to shift some part of their liability to others—would be difficult to maintain in the face of the huge amounts here extracted in settlement. Plaintiffs in this case have received more than $300 million in settlements—all, it should be remembered, without having had to prove liability on the part of anyone. (Petition for certiorari at 4 & Appendix D.)

II.

THE QUESTION OF CLAIM REDUCTION IS NECESSARILY BEFORE THE COURT.

Some Respondents may argue that this Court has no power to consider the merits of claim reduction because Petitioners' separate claim reduction motion was not decided by a final order in the district court.* They would

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* By separate motions in the trial court, Petitioners sought to assert (i) cross-claims for contribution and (ii) an affirmative defense of claim reduction. Both motions were denied. (Appendix E to petition for certiorari.) Final judgment pursuant to FED. R. CIV. P. 54(b) was entered with respect to the contribution motion only; and in a subsequent order the district court suggested that the question of claim reduction could be raised again when the case was submitted to the jury. 1980-1 TRADE CAS. ¶ 63,163 at 77,790 (S.D. Tex. December 21, 1979) (order approving settlements). The Fifth Circuit affirmed the order of the district court as it related to contribution and held that the question of claim reduction, because it had not been decided by a final order, was not properly before it on appeal. (Appendix B to petition for certiorari.)

have the Court evaluate a truncated rule of contribution, stripped of its claim reduction component—one which could readily be attacked for its adverse effect on settlements. But no one advocates such a rule for antitrust cases; and the Court's deliberations, if thus artificially limited, would be expended in the scrutiny of a legal chimera.

The disposition of Petitioner's claim reduction motion in the district court is irrelevant because that separate motion was surplusage. We know of no authority supporting a right of contribution in antitrust cases that does not regard claim reduction as an essential part of the rule where partial settlement are concerned. The present case involves partial settlements, so it necessarily raises the claim reduction issue.

Because the Fifth Circuit rejected out of hand any rule of damage apportionment in antitrust cases, it had no need to reach the further question of how such a rule might be applied to cases in which there have been partial settlements. Had it done so, it would have found that claim reduction was an integral part of the question before it. For the same reason, claim reduction is necessarily part of the question presented here.

CONCLUSION

For the reasons stated, the decision of the Fifth Circuit should be reversed, with directions that the district court permit the assertion of claims for contribution against non-settling defendants, and that plaintiffs' eventual judgment be subject to claim reduction to account for the settlements already made.

Dated: August 14, 1980

Respectfully submitted,

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10154
(212) 644-8000

Counsel of Record for
Milliken & Company, Milliken
Research Corporation and
Moulinage et Retorderie de Chavanoz

Of Counsel:

JAY TOPKIS
JAY GREENFIELD
STEVEN B. ROSENFELD
RONALD W. MEISTER
HOWARD S. VEISZ
ANDREW KULL
GERARD E. HARPER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

STATUTORY APPENDIX

S. 1468, 96th Cong., 1st Sess. (1979):

A BILL To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"SEC. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

"(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability

by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

"(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

"(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

"(e) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.".

Contribution Amendment to the Clayton Act, Proposed by American Bar Association Section of Antitrust Law (1979):

"Section . *Contribution Rights of Defendants.*

"(a) In any action brought under section 4, 4A or 4C of the Act, if the damages recoverable from any defendant were, in whole or in part, caused by the wrongful acts or omissions of another, rights of contribution shall exist and be enforceable in accordance with this section, and not otherwise.

"(b) Claims for contribution in antitrust actions may be asserted by the filing of a counterclaim, cross-claim or third party claim in the same action as that in respect of which contribution rights are claimed, or in a separate action.

"(c) Claims for contribution will be barred unless they are filed (i) within one year of the date of service of the original complaint giving rise to potential liability, or (ii) within sixty (60) days after the claimant for contribution receives reasonable notice of his liability or potential liability based in whole or in part upon damages caused by the wrongful acts or omissions of another, whichever date occurs later. Notwithstanding the foregoing, claims for contribution shall be barred unless they are filed within sixty (60) days after the entry of final judgment by the district court awarding damages against a prospective claimant for contribution.

"(d) Contribution rights may be claimed only against those persons for whose wrongful acts or omissions plaintiff seeks to recover damages from one or more defendants.

"(e) Contribution may not be obtained in favor of or against a person who, pursuant to a settlement agreement with a plaintiff in the action in respect of which contribution rights are claimed, has been released from potential liability for the underlying claim. To avail itself of this paragraph, a settling defendant must advise the court and all other defendants, in writing, of the existence of the settlement agreement within sixty (60) days of its execution.

"(f) Following a settlement in the action in respect of which contribution rights are claimed with less than all defendants, the plaintiff may, within sixty (60) days of the settlement, elect to withdraw from the damage action all claims based upon the acts or omissions of the settling person or persons. Failing such an election by plaintiff, the court shall reduce any judgment by the amount for which each settling defendant would have been liable for contribution had there been no settlement.

"(g) Contribution claims shall be determined by the court following the trial of the action in respect of which contribution rights are claimed in accordance with the relative responsibility of each party for the damages awarded in the main action which are subject to contribution rights as provided herein.

"(h) Nothing in this section shall preclude two or more persons from agreeing to (i) apportion their collective liability in some manner other than as specified in this section or (ii) toll the automatic barring effect of paragraph (c).

"(i) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section."

New York General Obligations Law § 15-108 (1974):

(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the

same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.

Uniform Comparative Fault Act (1977) (extracts):

Section 2. [Apportionment of Damages]

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories, or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

* * *

Section 6. [Effect of Release]

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.